Supreme Court, U. S.
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No. 73-1363

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530,

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. WEINGARTEN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–7A) is reported at 485 F. 2d 1135. The decision and order of the Board (Pet. App. C, pp. 9A–30A) are reported at 202 NLRB No. 69.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 8A) was entered on October 9, 1973. On December 29, 1973, Mr. Justice Powell extended the Board's time for filing a petition for a writ of certiorari to

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and including March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of her union representative at an investigatory interview with the employer which the employee reasonably believes will result in disciplinary action.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> *Section 7.* Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> *Section 8(a).* It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

STATEMENT

The Board (two Members dissenting) held (Pet. App. C, pp. 9A–11A) that respondent J. Weingarten,

Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act by refusing the request of its employee, Leura Collins, for the presence of her union representative at an investigatory interview relating to suspected theft of Company property by her, and insisting that she participate in the interview without that representative. In its decision in this case the Board followed its earlier decisions in *Mobil Oil Corp.*, 196 NLRB 1052, enforcement denied, 482 F. 2d 842 (C.A. 7), and *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied on this issue, 481 F. 2d 1018 (C.A. 4), pending on petition for writ of certiorari, No. 73–765. As the Board explained in *Mobil Oil Corp.*, 196 NLRB 1052, "it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy." In the present case the Board ordered the Company, *inter alia*, to cease and desist from requiring any employee, who has requested the presence of his union representative, to take part in an interview, which he has reasonable grounds to believe may result in disciplinary action, without the presence of that representative (Pet. App. C, p. 28A).

The court of appeals, relying on its prior decision in *Texaco, Inc.* v. *National Labor Relations Board*, 408 F. 2d 142, and "strengthened by the recent opinions of the Seventh and Fourth Circuits * * *" in *Mobil* and *Quality, supra*, declined to enforce the Board's order (Pet. App. A, p. 4A). In the court's view, "an inves-

tigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (Pet. App. A, p. 7A).

REASONS FOR GRANTING THE WRIT

This case presents the same issue as *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co., et al.*, No. 73–765, petition for a writ of certiorari pending. Although the Board did not file a petition in No. 73–765, it recognized that the issue is an important and recurrent one and did not oppose the granting of the union's petition in that case (Memorandum for the National Labor Relations Board, No. 73–765, pp. 3–4). For the same reasons, review is warranted in the present case.

CONCLUSION

Accordingly, we respectfully submit that this petition for a writ of certiorari should be granted. If the Court grants the petition in No. 73–765, it may deem it appropriate to defer action on the present petition until it has decided No. 73–765, and then dispose of it in accordance with that decision.

ROBERT H. BORK,
Solicitor General.
PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1974.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

NO. 73–1891
SUMMARY CALENDAR [1]

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

J. WEINGARTEN, INC., RESPONDENT

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

October 9, 1973

Before BROWN, *Chief Judge,* DYER and SIMPSON, *Circuit Judges*

DYER, *Circuit Judge.* The National Labor Relations Board, pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C.A. § 160(e), seeks enforcement of its order finding that J. Weingarten, Inc., violated section 8(a)(1) of the NLRA, 29

[1] Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

U.S.C.A. § 158(a)(1), by refusing to allow a union representative to be present at an investigatory interview with an employee. We conclude that, under the facts found by the Administrative Law Judge, there was no legal requirement for a union representative to be present and accordingly we deny enforcement of the Board's order.

I.

The facts are essentially undisputed. Weingarten operates a series of retail stores and Leura Collins has been employed by the Company in its lunch counter or "lobby department" at store #98. In mid-June 1972, Don Hardy, a loss prevention specialist working for Weingarten, was asked to observe Collins to determine whether reports of her stealing from the store were true. Hardy observed nothing unusual during a day and one-half at the store, but he did learn from Joe York, the manager of store #98, that another employee, Jewel Moody, had reported a theft by Collins the previous day. When this report was verified with Moody, Hardy and York called Collins to a meeting in the employee's lounge at a time when no one else was present.

At the meeting Collins was confronted with the charges of theft. She denied any wrongdoing and offered an apparently plausible explanation for her actions. She also asked either "Shouldn't the Union be in on this?" or "Could I have Billie [the Union representative] with me?" Whatever the exact question, the response in essence was, "No, this is a private matter." A short time later, Collins' explanation was verified and she was told that the matter was closed.

When told this, Collins became emotional and stated that the only things she had ever taken from Weingarten were her free lunches. This revelation came as a

surprise to both York and Hardy who believed that this was directly contrary to store policy. They began questioning Collins again to determine the scope of this practice. Faced with the reopening of the interview, she again requested the presence of the Union steward and was again told that the interview was a private matter. The interview finally ended when Hardy learned that employees at some Weingarten stores did in fact get free lunches and that the policy was unclear at store #98. Collins was given the rest of the day off and was told not to discuss the matter with anyone.

II.

The Board asserts that the interview, in which it found Collins had reason to fear for her job, was a proper place for union representation and argues that the denial of that representation constituted an 8(a)(1) violation. Its position is based on the decisions in *Quality Manufacturing Co.*, 1972, 195 N.L.R.B. No. 42, 79 LRRM 1269, and *Mobil Oil Corp.*, 1972, 196 N.L.R.B. No. 144, 80 LRRM 1188, and is best stated in the following passage from *Mobil:*

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect

his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

The company responds on two fronts. First they argue that Collins did not make sufficiently clear her requests for union representation and that her continuation with the interview after her requests were denied constituted permission for the interview. Secondly, they question the merits of the legal rule advanced by the Board in *Mobil* and *Quality*, and argue that the proper rule was established by this Court in *Texaco, Inc., Houston Producing Division v. NLRB*, 5 Cir. 1969, 408 F.2d 142.

III.

As a preliminary matter, we conclude from a careful reading of the record that Collins adequately raised the question of union representation and we know of no rule that would require her to halt the interview completely in order to be able to raise before the Board and this Court the question of her right to that representation. Consequently, we face squarely the question decided by the Board in *Mobil* and *Quality*, and reject the rule enunciated there. Our conviction in this regard is strengthened by the recent opinions of the Seventh and Fourth Circuits which denied enforcement of the comparable portions of the Board's orders in *Mobil* and *Quality*. *Mobil Oil Corp. v. NLRB*, 7 Cir. 1973, —— F.2d —— [No. 72-1415, July 17, 1973]; *NLRB v. Quality Manufacturing Co.*, 4 Cir. 1973, —— F.2d —— [No. 72-1663, July 19, 1973].

Our inquiry into the merits must initially focus on the nature of the confrontation between Collins on the one hand and York and Hardy on the other. There has

been no suggestion that the meeting was anything other than a preliminary fact-finding interview. Indeed the Board in its brief before this Court consistently refers to the meeting as an investigative interview. As we said in our *Texaco* decision on related facts, there is no evidence that the company sought to deal with the employee about the consequences of her misconduct: "[t]he function of the interview was to question [the employee], not to bargain with [her]." 408 F.2d at 144.

With the interview thus defined, it is not surprising that the company seeks to rely on a long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present. *See, e.g., Illinois Bell Telephone Co.*, 1971, 192 N.L.R.B. No. 138; *Texaco, Inc., Los Angeles Terminal*, 1969, 179 N.L.R.B. 976; *Wald Manufacturing Co.*, 1970, 176 N.L.R.B. 839, *aff'd*, 6 Cir. 1970, 426 F.2d 1328; *Dayton Typographic Service, Inc.*, 1969, 176 N.L.R.B. 357; *Jacobe-Pearson Ford, Inc.*, 1968, 172 N.L.R.B. No. 84; *Chevron Oil Co.*, 1967, 168 N.L.R.B. No. 574; *Dobbs Houses, Inc.*, 1964, 145 N.L.R.B. 1565. *See also NLRB v. Ross Gear & Tool Co.*, 7 Cir. 1947, 158 F.2d 607. The Board does not expressly repudiate those decisions, but attempts to distinguish them by finding a violation of Collins' section 7 rights by virtue of the nature of the investigative interview.

In addition to its own precedent, the Board is well aware that it must distinguish the Fifth Circuit *Texaco* case or that decision would be binding precedent upon us, absent en banc reconsideration. In *Texaco*, the Board's order, which found both an 8(a)(1) and an 8(a)(5) violation, was denied enforcement when we found no requirement for union representation at an investigative interview. The Board contends that

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that case was essentially a "refusal to bargain" case which did not put at issue any other section 7 rights. This contention was considered by the Fourth Circuit in *Quality* and rejected by the following language, which we adopt in full.

> Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline if such direction is not obeyed. And the statement that a particular Section 7 right [the right to act in concert for mutual aid and protection] mentioned in the above quotation had not been previously considered is inaccurate when examined in the context of the case before us. As illustrated by the cases cited in this opinion, the Board has many times been confronted with an alleged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases. Yet never has it been thought, as the Board would hold here, that such rights require an employer to permit an employee to have a union representative present whenever the employee "has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions."

—— F. 2d at —— (footnote omitted).

The crux of this case thus hinges on a proper interpretation of section 7 of the NLRB.[2] The Board centers its argument on the language guaranteeing

[2] Section 7 of the NLRB, 29 U.S.C.A. § 157, provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

employees the right to act in concert for mutual aid and protection. This right is triggered, it contends, when an employee being interviewed has a reasonable basis for believing that his job is in jeopardy. Thus it concludes that a denial of requested representation at that point constitutes a violation of section 8(a)(1).[3] We disagree.

While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview. To extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7. We follow the Seventh Circuit's decision in *Mobil, supra,* but we find it unnecessary at this time to approve or disapprove that part of the opinion (see —— F.2d at —) which placed great emphasis on the economic pressure function of section 7. We believe that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment.

This interpretation of the scope of section 7 is consistent with our decision in *Texaco* and agrees with the conclusions of the Fourth and Seventh Circuits.

Enforcement denied.

[3] Section 8(a)(1), 29 U.S.C.A. § 158(a)(1) provides that it shall be an unfair labor practice for an employer, "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7]."

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 73–1891

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

J. WEINGARTEN, INC., RESPONDENT,

JUDGMENT

Before BROWN, *Chief Judge,* DYER and SIMPSON, *Circuit Judges*

This cause came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, J. Weingarten, Inc., its officers, agents, successors, and assigns. The Court, having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for disposition without oral argument, on October 9, 1973, handed down its decision denying enforcement of the Board's Order. In conformity therewith it is hereby.

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be denied.

Entered: OCTOBER 9, 1973.

APPENDIX C

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202 NLRB No. 69

United States of America before the National Labor Relations Board

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Case 23—CA—4401

J. WEINGARTEN, INC.

AND

RETAIL CLERKS UNION, LOCAL UNION NO. 455, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL–CIO

DECISION AND ORDER

On November 21, 1972, Administrative Law Judge Joseph I. Nachman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and

[1] We note and correct the following error in that section of the Administrative Law Judge's Decision entitled "Findings of Fact" which in no way affects the results of this case. The Administrative Law Judge correctly found that Collins testified that her request that a representative of the Union be present was refused, but stated that her request was allegedly refused by Perry, rather than by York.

conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, J. Weingarten, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order and that the complaint, herein, to the extent that it alleges a violation of Section 8(a)(5) of the Act, be, and it hereby is, dismissed; provided however, that:

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[2] Members Fanning and Jenkins, for the reasons set forth in their dissents in *Collyer Insulated Wire*, 192 NLRB No. 150, and *Radiocar Corporation*, 199 NLRB No. 137, dissent from the recommendation of the Administrative Law Judge that the alleged 8(a)(5) violation be deferred to arbitration and they would proceed to determine the dispute on its merits.

Member Kennedy, for the reasons set forth in his dissenting opinions in *Quality Manufacturing Company*, 195 NLRB No. 42, and *Mobil Oil Corporation*, 196 NLRB No. 144, dissents from the conclusion of the Administrative Law Judge that the Respondent engaged in unfair labor practices proscribed by Sec. 8(a)(1) of the Act by denying Collins' request for union representation during her interview.

Member Penello would also dismiss the 8(a)(1) allegation because it is clear from the record that Respondent was merely conducting an investigative rather than a disciplinary interview. See *Western Electric Company, Hawthorne Works*, 198 NLRB No. 82, and *National Can Corporation*, 200 NLRB No. 156.

Jurisdiction of this proceeding is hereby retained for the limited purposes stated in The Remedy section of the attached Decision.

Dated, WASHINGTON, D.C.

EDWARD B. MILLER,
Chairman,
JOHN H. FANNING,
Member,
HOWARD JENKINS, JR.,
Member,
RALPH E. KENNEDY,
Member,
JOHN A. PENELLO,
Member,
National Labor Relations Board.

United States of America Before the National Labor Relations Board, Division of Judges, Washington, D.C.

Case No. 23–CA–4401

J. WEINGARTEN, INC.

and

RETAIL CLERKS UNION LOCAL UNION NO. 455, RETAIL CLERK'S INTERNATIONAL ASSOCIATION, AFL–CIO

William H. Helms, Esq., Houston, Texas, for the General Counsel

Fulbright, Crooker & Jaworski, by *Neil Martin, Esq.*, Houston, Texas, for Respondent

DECISION

Statement of the Case

JOSEPH I. NACHMAN, *Administrative Law Judge.* This case tried before me at Houston, Texas, on September 28,[1] with all parties present and duly represented, involves a complaint[2] pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein the Act), which alleges in substance, that J. Weingarten, Inc. (herein Respondent or Company), (a) in the course of interviewing Leura Collins, an employee whom Respondent suspected of having engaged in an act of dishonesty, refused Collins' request that a representative of Retail Clerks Union, Local No. 455, Retail Clerks International Association, AFL–CIO (herein Union, or Local 455), the collective-bargaining representatives of Respondent's employees in an appropriate unit, be present at such interview, thereby violating Section 8(a)(1) of the Act, and (b) unilaterally changed a term and condition of employment of employees in the unit represented by Local 455, thereby violating Section 8(a)(5) of the Act. For reasons hereafter stated I find and conclude that Respondent violated Section 8(a)(1) of the Act by denying Collins' request for union representation at her interview, and that the issue with respect to the alleged violation of Section 8(a)(5) of the Act should be deferred to arbitration is accordance with the agreement of the parties.

At the trial all parties were afforded full opportunity to examine and cross-examine witnesses, to introduce relevant and material evidence, to argue orally on the record, and to submit briefs. Oral argument was waived. Briefs submitted by the General Counsel and Respondent, respectively, have been duly considered. Upon the pleadings, stipulations of counsel, the evidence, including my observation of the demeanor of the witnesses while testifying, I make the following:

[1] This and all dates herein are 1972, unless otherwise stated.

[2] Issued August 8, on a charge filed June 20, and amended July 17.

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FINDINGS OF FACT [3]

THE UNFAIR LABOR PRACTICES ALLEGED

BACKGROUND

Respondent operates a chain of approximately 100 retail stores. Some years ago each store had a lunch counter, but as new stores opened, so-called lobby operations were substituted for the lunch counter operation. The Union has been recognized for many years as the collective-bargaining representative of Respondent's sales personnel. The last contract between Respondent and the Union, applicable to such employees, was entered into September 9, 1971, effective through September 9, 1974. The contract contains the following pertinent provisions:

> Article 4—Discharge and Discrimination
>
> * * * * *
>
> B. An employee may be discharged for proper cause, and the Employer shall give notice in writing of such discharge to the Union. The employer shall not discharge any employee without proper cause and shall give at least one (1) written warning notice of the specific complaint or complaints against such employee to the employee and to the Union, except that no warning notice need be given to an employee, before discharge, if the cause of such discharge is dishonesty . . .
>
> * * * * *
>
> Article 18—Dispute Procedure
>
> A. The Union shall have the right to designate store stewards for each store.

[3] No issue of commerce or labor organization is presented. The complaint alleges, and by answer Respondent admitted facts which establish those jurisdictional elements. I find those facts to be as pleaded.

> B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:
>
> Step 1. By conference between the aggrieved employee and/or store steward, Union business representative, or either, and the manager of the store.
>
> Step 2. By conference between the Union business representative and/or store steward and the District or Zone Manager.
>
> Step 3. By conference between an official of the Union and the President of the Employer or his designate.
>
> Step 4. In the event the last step fails to settle satisfactorily the complaint, it may be referred to arbitration by either party.
>
> C. In the event the parties cannot agree upon the selection of an arbitrator within fifteen (15) days from the date of referral of the controversy to arbitration, the arbitrator shall be selected in the following manner.
>
> The Federal Mediation and Conciliation Service shall be jointly requested by the parties to name a panel of seven (7) arbitrators. The parties shall then choose the arbitrator by alternately striking a name from the list until one (1) name remains as the arbitrator chosen by the parties and empowered to arbitrate the dispute.
>
> The arbitrator shall be authorized to rule and issue a decision and award in writing on any issue presented for arbitration, including the question of the arbitrability of such issue. His decision and award shall be final and binding upon the parties to this Agreement. Where more than one employee is a part of a common

grievance, it shall be heard as a single grievance. The fees of the arbitrator shall be borne one-half (½) by the Union and one-half (½) by the Employer party to the arbitration.

The arbitrator shall have no power to add to, subtract from, alter, amend, modify or project beyond its meaning any of the terms and provisions of this Agreement.

The time limit set forth in this Article may be extended upon mutual agreement of the parties.

D. No grievance will be considered or discussed which is presented later than fifteen (15) calendar days after such has happened excepting for any and all claims involving wages, which may be presented within six (6) months. Grievances that have progressed through Step 1 of the dispute procedure must be submitted in writing to be considered in Step 2.

E. The parties agree that grievances may arise of a general nature affecting or tending to affect several employees, and that such grievances may be initiated at any of the above mentioned steps deemed appropriate by the parties.

To guard against loss due to dishonesty on the part of employees and/or the public, the Company employs a number of persons classified as "Loss Prevention Specialist" who work mainly undercover among the several stores. These operatives carry no arms, nor are they identified with any law enforcement agency. At all times material, Don Hardy was employed in the capacity mentioned, and his immediate superior was Company Vice President Hal Burnett.

The Instant Case

Denial of Union Representation

Leura Collins was initially employed by Respondent about 1961, for work at Store No. 2. This is a store which has a lunch counter, and Collins was told at the time of her hire that she would be entitled to a lunch and a drink each day she worked, free of cost to her. Collins availed herself of this privilege. About October 1970, when Store No. 98 first opened for business, Collins was transferred to that Store and was working there at the time of the events hereafter referred to. Store 98 being of the lobby type, does not have a lunch counter, and Collins was assigned to work in the lobby. According to Collins' uncontradicted and credited testimony, she was never told that the free lunch situation at Store 98 would be any different from that which had prevailed at Store No. 2, and the evidence shows that she as well as most, if not all the employees in the lobby department, including the manager of that department, took lunch from the lobby without paying for it.[4]

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[4] Respondent introduced evidence to the effect that prior to opening a new store, a management official conducts an indoctrination course for the employees of each department, at which it would have been his duty to inform employee of the provisions of Respondent's manual which requires that employees purchase such items as milk and cookies for lunch while off the clock, and that such items must be consumed in designated lunch areas, with the purchase receipt retained by the employee. Collins credibly testified that she did not attend such a meeting,

On or about June 15, Loss Prevention Specialist Hardy was directed by his superior to investigate a complaint that an employee in the lobby at Store 98 was taking money from the cash register. The name given Hardy as the suspected employee was Leura Collins. Hardy spent the rest of that day and the following day observing the lobby, but saw nothing to indicate dishonesty on the part of anyone. The following day, just before noon, Hardy went to the store, introduced himself to Manager York whom he had not theretofore known, and told the latter that he observed the lobby department for about 2 days, but found nothing wrong. At this point York told Hardy that just that morning employee Moody had told him that she had observed Collins purchasing a box of chicken which sold for $2.98 and for which she had paid $1.00. After lunch, Hardy and York called Moody to an area of the second floor where York's desk is located, and where they interviewed her relative to the report York had received. Moody confirmed that she had observed what she had therefore reported to York. Moody was then excused, and York sent for Collins.

Before Collins came upstairs to where Hardy and York were, they moved away from York's desk and more into the center of the area used primarily as the employee lounge. No employees were in the area at the time. York testified this was done to make the conversation more private. When Collins arrived, Hardy was introduced as a representative of Respond-

and there is no evidence that the manual provision was in fact brought to her attention or the attention of any other employee. Although the testimony shows that a copy of the manual was kept in the lobby department, there is no testimony that Collins in fact referred to it, and she credibly testified that she did not do so.

ent's security office.[5] Hardy began questioning Collins about the purchase of the chicken. She readily admitted that before going to work on June 15, she purchased some chicken, a loaf of bread and a cake which she paid for and donated to her church for a dinner the latter was giving. When questioned about the quantity of chicken she has purchased, Collins explained that she purchased four pieces for which the price was $1.00, but that because the store was out of the small size boxes, the chicken was put into the larger box normally used when a greater quantity is purchased. At this point Hardy went to the selling floor and asked Moody if the store was in fact out of the smaller size boxes. Moody confirmed that this was a fact, and that they had been unavailable in the store when Collins purchased the chicken. Hardy then asked Moody if she knew how many pieces of chicken were in the box that Collins purchased. When Moody replied that she did not have such information, and only knew that it was the large size box, Hardy returned to the interview area and told Collins that he had verified the information she had given; that he was sorry if she had been inconvenienced, but that the matter had been cleared up and was now closed.[6]

Collins testified that several times while she was being questioned by Hardy about the purchase of the chicken, she asked Store Manager York that Union Steward Brockett, or some other representative of the Union be present, and that Perry refused saying

[5] Throughout her testimony, Collins referred to Hardy as the detective. I find nothing in the evidence to warrant the inference that Collins had any reason to believe that Hardy had any official authority, or that he was anything other than what he was introduced to be.

[6] My findings to this point are based on a composite of the credited testimony of Collins, Hardy and York, which, to the extent mentioned is not in material dispute.

this was a private matter between her and the Company, and that his presence was all that was necessary. Both Hardy and York testified that Collins did not ask for union representation during the questioning, but only asked shouldn't someone from the Union be here, and that had she in fact requested such representation during the questioning, the interrogation would have been promptly terminated. I do not regard this as a conflict in the testimony. Even assuming that Collins used the words Hardy and York attributed to her, while perhaps not quite as articulately expressed as by one more fluent in the English language, it was in her way of expressing herself, a request that a representative of the Union be present during her interrogation, and York's reply that he did not regard this as necessary was legitimately understood by her to be a denial of her request.

The Alleged Section 8(a)(5) Violation

When Hardy returned to the interview area and told Collins as above stated, that the matter of her purchase of the chicken was closed, Collins began crying and spontaneously remarked that the only thing she had ever gotten from the store without paying for it was her free lunch. Both Hardy and York expressed astonishment that employees were getting a free lunch, and questioned Collins closely about the practice, what employees were getting a free lunch, the frequency with which she got such lunch, and the nature thereof. Hardy began preparing a statement of the facts, particularly trying to compute how much Collins owed Respondent for the free lunches she had gotten, arriving at a figure of about $160. Because Collins continued to insist that she was entitled to her lunch free of charge, Hardy left the area and made

a telephone call to his superior, Hal Burnett. Hardy told Burnett about Collins' claim that she was entitled to a free lunch, and Burnett said he would look into the matter and call Hardy back. While Hardy was making his call to Burnett, Collins again asked York if she could have a union steward with her, but that York again refused. When Hardy returned from his call to Burnett, he continued taking his statement from Collins, but she informed York that she would not sign it. About this time Hardy went to take Burnett's call, and was told by Burnett that it was the practice in some stores for employees to get free lunches, but that he had been unable to ascertain what the practice was at Store 98. With this information Hardy returned to where Collins and York were, and terminated the interrogation of Collins.

When the interrogation of Collins ceased, York asked Collins not to discuss the matter with anyone, because he considered it private between her and the Company, and of no concern to others. Collins did, however, report all aspects of the incident first to her shop steward, and immediately thereafter, at the steward's suggestion, to a representative of the Union. Immediately following the interrogation of Collins, Manager York discussed the matter of free lunches with Lobby Department Manager Odoms. She told York that the practice of free lunches in the department did exist, and that in fact she took free lunches. The following day York issued orders that the practice cease immediately. As a result of this the Union filed a grievance with the Company, pursuant to the terms of the contract, which, in pertinent part, reads:

> 6. *Details of grievance, etc.*: The employees in the Lobby Department of Weingarten #98 have always received their lunches and

drinks free, as of Friday, June 16, 1972 this practice was discontinued. This is a reduction in benefits that these employees are entitled to.

7. *Settlement requested*. That these employees be given their lunches and drinks as it has always been done in the past.

Respondent accepted the aforementioned grievance and expressed its willingness to process it pursuant to and in accordance with the grievance procedure provided in the contract. Union Agent Phillips testified that the Union decided to defer processing of its said grievance until such as the outcome of this proceeding is known to it.

CONTENTIONS AND CONCLUSIONS

1. The Alleged Denial of Union Representation

In *Mobile Oil Corporation,* 196 NLRB No. 144, the Board relying on its prior decision in *Quality Manufacturing Company,* 195 NLRB No. 42, held that:

> * * * it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employees' right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection against possible adverse employer action.

Apply[ing] the principles enunciated in *Mobile Oil, supra,* to the facts of the instant case, I must and do find and conclude Respondent's interrogation of Collins, under the facts of this case violated Section 8(a)(1) of the Act. Having heretofore found that Collins

requested union representation at the interview, and that her request was denied by York the only real question to be decided is whether under all circumstances Collins could reasonably conclude that the interview might put her job security in jeopardy. I find that she could so reasonably conclude.

Although Collins when first notified that she was wanted upstairs, thought that the subject to be discussed with her was the possibility of a transfer to another store, the interview had not proceeded very far before she learned that Hardy, as a representative of respondent's security department, was questioning her concerning a possible act of dishonesty on her part, relating to the performance of her duties as an employee. Under these circumstances Collins could certainly reasonably conclude that action might be taken by Respondent which would put her job security in jeopardy.[7] That neither Hardy nor York had authority to impose discipline on Collins, as Respondent argues, is beside the point. To Collins the possibility of discipline was just as real whether the discipline that might be visited upon her was imposed immediately by Hardy and/or York, or at some future time by the President of the Company. Equally beside the point is Respondent's argument that Collins was not in fact "afraid of her job," that she was not afraid of being accused of something because she knew

[7] Particularly in a retail store, dishonesty on the part of an employee, when established to an employer's satisfaction, is normally regarded as an unpardonable offense, and the penalty imposed therefor, except under the most unusual circumstances, is discharge. Even Respondent's witness, Joe Perry, virtually admitted as much, and to the extent that his testimony may be regarded as indicating that Respondent follows a more lenient policy, I regard it as mere puffing, which I do not credit.

she had done nothing wrong, and that the concern she expressed in her testimony for her job was merely an afterthought on her part. As the Board held in *Quality Manufacturing, supra,* in determining whether an employee has reasonable ground to fear that an interview may adversely affect his continued employment is to be measured by objective standards in light of all the circumstances of the case. As heretofore indicated, that standard was clearly satisfied here.

Accordingly, I find and conclude that by denying Collins' request for union representation at the interview conducted by Hardy and York, Respondent violated Section 8(a)(1) of the Act.

The Section 8(a)(5) Allegations

As heretofore indicated, when York ascertained, as a result of the interview with Collins, that many if not all the employees in the lobby department were obtaining their lunch in the store without paying for it, he gave orders that the practice be forthwith terminated. That there was no notice to or bargaining with the Union concerning this change is conceded. The General Counsel contends that this was a unilateral change in wages, hours and terms and conditions of employment, and hence violated Section 8(a)(5) and (1) of the Act. However, the evidence also shows that promptly upon learning of York's order that employees no longer have free lunches, the Union filed a grievance thereon pursuant to the grievance and arbitration provisions of the collective bargaining agreement, requesting that the status *quo ante,* be restored. In support of its position that on this aspect the Board should defer to the arbitration procedures, Respondent relies upon the Board's decision in *Collyer*

Insulated Wire etc., 192 NLRB No. 150, and the subsequent line of cases following it, while the General Counsel argues that the matters here in dispute are not covered by the grievance and arbitration provisions of the contract. As heretofore indicated, Respondent accepted the grievance, and in its answer herein, reiterated at the trial, expressed its willingness, indeed its desire, that the matter in dispute be determined in the manner specified in the contract. The Union, however, has not pursued its grievance because it first wishes to ascertain what relief it will obtain in the instant proceeding.

In *Collyer, supra,* and the later cases refining its application, the Board has made it clear that the *Collyer* rule will be applied where two basic conditions have been met, namely (1) the dispute is in fact susceptible of resolution under the operation of the grievance procedure agreed to by the parties, and (2) there is no reason to believe that resort to the procedures agreed upon by the parties will not bring about resolution of the issues in a manner compatible with the purposes of the Act. *Eastman Broadcasting Company, Inc.,* 199 NLRB No. 58, slip opinion pp. 11–12. The dispute procedure set up in the contract between the parties provides that it shall apply to "any differences, disputes, or complaints aris[ing] over the interpretation or application of the contents of this agreement," which is to be resolved through a four step procedure culminating in binding arbitration. Although the arbitrator is prohibited from making any award which has the effect of subtracting from, altering, amending or modifying any term or provision of the agreement, the arbitrator is authorized to make a final and binding award "on any issue presented for arbitration, including the question of the arbitrability of such issue."

This language, if there is any practical distinction between it and the contract language in *Eastman Broadcasting, supra,* is even broader in that in the instant case the arbitrator is authorized to determine the arbitrability of the dispute.[8] Nor do I find on this record, any reason to believe that the machinery provided by the parties will not result in a resolution of the instant dispute in a manner compatible with the purposes and policies of the Act. At least it will be time enough for the Board to intervene if and when future events demonstrate that the anticipated result has not been accomplished.

Accordingly, I find and conclude that without deciding the merits of the dispute concerning the entitlement of the lobby employees to free lunches, and without prejudice to any party, this aspect of the complaint herein should be dismissed, but that jurisdiction over that issue should be retained solely for the purpose of entertaining appropriate and timely motions for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

[8] Even if, as the General Counsel argues, "the prime requirement . . . for deferral . . . is that the subject matter . . . must be the subject of the terms of [the] contract,"—a contention apparently in conflict with the Board's decision in *Eastman Broadcasting, supra,* and the cases there cited in fn. 14—we have in the instant case, by virtue of the grievance filed by the Union for processing pursuant to contract procedure, and Respondent's acceptance of that grievance, for processing in accordance with the contract, an *ad hoc* agreement to resolve the instant dispute in the manner specified in the agreement between the parties.

Upon the foregoing findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By denying Collins' request for union representation at an interview conducted by Respondent under circumstances from which Collins could reasonably conclude that her job security was in jeopardy, Respondent interfered with, coerced and restrained employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby engaged in, and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.
5. It would best effectuate the policies of the Act if, without prejudice to any party and without deciding whether the termination of free lunches for the lobby employees violated Section 8(a)(5) of the Act, the parties be relegated to the grievance-arbitration procedures of the contract.[9]

[9] Respondent argues that as the alleged Section 8(a)(5) violation must be deferred to arbitration, the alleged Section 8(a)(1) violation should also be so deferred. Respondent cites no authority for this position, and simply argues that the arbitrator will thus be able to dispose of the entire dispute. The General Counsel on the other hand, argues that as the Board must in any event take jurisdiction of the Section 8(a)(1) violation, it should also decide the Section 8(a)(5) allegations,

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and take certain affirmative action designed and found necessary to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [10]

ORDER

Respondent, J. Weingarten, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee to take part in an interview or meeting without union representation, if such representation has been requested by the employees and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action.

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and thus decide the entire controversy, citing *Metal Worker's International Association etc. (George Kock Sons, Inc.)*, 199 NLRB No. 26. Language in that decision appears to support the General Counsel's position. However, on the facts of this case, I find applicable the Board's decision in *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB No. 44. There the Board decided one aspect of the case, but deferred another aspect to arbitration.

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Act:

(a) Post at its Store No. 98, Houston, Texas, copies of the attached notice marked "Appendix." [11] Copies of said notice, to be furnished by the Regional Director of the Board for Region 23 (Houston, Texas) after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing within 20 days from the date of this Order, what steps it has taken to comply herewith.

It Is Further Ordered, that the complaint herein, to the extent that it alleges a violation of Section 8(a)(5) of the Act, be and the same is dismissed, provided, however, that jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after issuance of this Decision, either been resolved by

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedure has not been fair and regular or has reached a result which is repugnant to the Act.

Dated at WASHINGTON, D.C.

JOSEPH I. NACHMAN,
Administrative Law Judge.

APPENDIX JD-783-72

FORM (LRB-4727 (9-69))

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT require that any employee take part in an interview or meeting without union representation if the employee requests such representation and if the employee has reasonable grounds to believe that the matters to be discussed at such interview or meeting may result in his being subject to disciplinary action.

J. WEINGARTEN, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Dallas-Branch Building, 1125 Brenon Street, Houston, Texas 77002 (Tel. No. (713) 226-4296)

U.S. GOVERNMENT PRINTING OFFICE: 1974